Supreme Court U.S.
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No. 01-1811

In the
Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, AND N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent James D. Koenig, on behalf of himself and the class of similarly situated consumers, et al. (hereinafter Plaintiffs), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 291 F.3d 1035 (8th Cir. 2002).

STATEMENT OF THE CASE

On June 8, 1999, the Minnesota Attorney General filed suit against U.S. Bank. See Hatch v. U.S. Bank Nat'l Assoc. ND, Civ. No. 99-872 (D. Minn. 1999) (Rosenbaum, J.). Following on the heels of that suit, numerous class actions with essentially identical allegations were filed in June and July of 1999.[1] Of these, seven were filed in the District of Minnesota and the remaining three were filed in California, Washington and Idaho, respectively. Venues in the out-of-state actions (after contested motions in two of the three cases) were transferred. Ten class actions were ultimately consolidated in In re US Bancorp Litigation, Civ. No. 99-891 (D. Minn.

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[1] These were Koenig v. U.S. Bank Nat'l Assoc. ND, No. 99-891 (D. Minn. 1999); Bergman v. U.S. Bank Nat'l Assoc. ND, No. 99-1038 (D. Minn. 1999); Saunders v. U.S. Bank Nat'l Assoc. ND, No. 99-909 (D. Minn. 1999); Korn v. U.S. Bank Nat'l Assoc. NA, No. 99-893 (D. Minn. 1999); Johnson v. U.S. Bank Nat'l Assoc. ND, No. 99-920 (D. Minn. 1999); Mans v. U.S. Bank Nat'l Assoc. NA, No. 99-921 (D. Minn. 1999); Somers v. U.S. Bank Nat'l Assoc. NA, No. 99-922 (D. Minn. 1999); Gaillard v. U.S. Bank Nat'l Assoc. ND, No. 00-46 (D. Minn. 2000); Mallove v. U.S. Bank Nat'l Assoc. ND, No. 00-665 (D. Minn. 2000); and Scalise v. U.S. Bancorp, No. 00-1197 (D. Minn. 2000).

1999), pursuant to the October 1, 1999 pretrial order no. 1 and are the suits involved in this case.

In each of the ten actions, Plaintiffs alleged that they were checking and/or credit card account holders of U.S. Bank and that U.S. Bank shared information respecting such accounts to outside parties. In response to each of these actions (and the consolidated action), while U.S. Bank admitted the essential facts of information sharing, it denied any liability, wrongdoing or compensable damages and denied that these actions could proceed as class actions.

During the prosecution of these federal actions a class action with similar claims was also pending in the Cass County District Court for the State of North Dakota, see Junkert v. First Bank Nat'l Assoc., Civ. No. 98-01577 (N.D. Dist. Ct. File May 27, 1998). Since both Junkert and these federal actions purported to be on behalf of North Dakota customers who would have been members of the stated class in both cases, both the North Dakota district court and the United States District Court had concurrent jurisdiction over this potential class (or subclass) of North Dakota residents.

Defendants in the North Dakota case moved for partial summary judgment in state court, and succeeded in obtaining a dismissal of five claims similar to those here, leaving a unique North Dakota statutory damage claim under N.D. Cent. Code § 6-08.1-03. Junkert, Civ. No. 98-01577 (Sept. 14, 1999 order). The state district court ruled as a matter of law that there were no legally cognizable damages for four of these claims (conversion, consumer fraud, false advertising and misrepresentation). Id. It also concluded that plaintiffs failed factually to support their invasion of privacy claim, as they were unable to show that it was communicated to the public at large. Id.

During the month following the commencement of the Minnesota Attorney General's lawsuit, and during the pendency of this litigation, U.S. Bank entered into a final judgment for injunctive and consumer relief in settlement of the State of Minnesota's claims. Hatch, Civ. No. 99-872 (June 30, 1999 order). In this judgment, the underlying conduct of the bank was identified, the bank agreed to be enjoined from further similar conduct, the bank forfeited all of its revenue from information sharing (not just profit) and the bank agreed to make product refunds to bank customers who asked for them.

This action differed from the Attorney General's lawsuit in that this action sought monetary damages for individual customers based on electronic information sharing. Because of the resolution of the Attorney General's action shortly after the litigation was commenced, there was no dispute about the Bank's actions, but only what liability could be based on those undisputed actions. Plaintiffs recognized there was a significant risk of no recovery in this case if it went to trial. The legal theories of damages on which the case was based had not been tested before and would have been difficult to prove at trial. The concern was whether Plaintiffs would be certified as a class and would be able to show legally compensable injury. This concern was buttressed by the events in the similar North Dakota class action where the court found no legally compensable damages as a matter of law. Furthermore, certification of the North Dakota class as to the damages was denied.

The district court ordered the parties to confer regarding settlement. Accordingly, after numerous meetings (including two all day meetings ordered by the district court), an agreement was reached. Significant work between the parties' counsel (more than ten Plaintiff law

firms) ensued, and a detailed methodology for the settlement of class claims was agreed upon and documented in the Stipulation of Settlement and Plan of Distribution to be approved by the district court.

The settlement agreement provides that U.S. Bank will pay $3.5 million to a fund against which class members may apply for payments and out of which Plaintiffs' attorneys' fees would be paid. (App. D1.) U.S. Bank was also responsible for the costs associated with notice, mailing and claims processing, which U.S. Bank estimated at $400,000. Thus, the total amount U.S. Bank was or is required to pay as a result of the consolidated class actions approximates $4 million.

On June 5, 2000, U.S. Bank and Plaintiffs executed a Stipulation of Settlement and on July 5 the federal district court preliminarily approved the terms and conditions of the settlement. (App. B1.) On August 15, the district court approved the claim forms and the notice of settlement which were subsequently mailed to class members. Six million claim forms were sent. Claim forms and notices resulted in 9,227 phone calls seeking information and 5,981 web site hits to the dedicated class administration web site. As of the December 1 hearing on motion for final approval of settlement, 81,695 class members had submitted claims and 525 class members had opted out. Only 70 individuals submitted objections, which is less than .001% of the persons in the class and less than 1% of the persons submitting claims.

On December 1, 2000, a settlement hearing was held. The class counsel presented in detail why the class action settlement should be approved. The Petitioners here filed written objections, appeared and were heard. Each objector to the settlement had his or her objection

acknowledged when it was served on class counsel and each objection was filed with the district court. Although not required, class counsel served each objector with a copy of the memorandum in support of the settlement and the request for fees. At the hearing on the motion for final approval of settlement, Petitioners addressed their concerns/objections to the district court.

The district court at that hearing assured the objectors that it would not make any decision without reading each objection in its entirety. The district court even gave one objector, who is one of the Petitioners, more time to submit a supplemental argument before making a decision.

On December 12, 2000, the district court entered its order and final judgment approving the settlement and awarding fees to Plaintiffs' class. (App. C1.) The district court approved the settlement as fair, reasonable, adequate, and in the class' best interest. It rejected the objectors' comments as insufficient to call into question the settlement's fairness and adequacy. The court also found the attorneys' fees and costs award to be fair and reasonable. (Id.)

In early January 2001, Petitioner N. Peter Knoll (a lawyer appearing pro se), Anne Knoll (his mother) and William J. Lorence moved to intervene to file an appeal, which motions were granted. On January 11, Petitioners N. Peter Knoll and Lorence appealed the district court's December 12, 2000 order; intervener Anne Knoll did not appeal. Also on January 11, Petitioner David R. Jansen belatedly moved to intervene and on January 16 the district court granted Petitioner's motion. Petitioner Jansen filed his notice of appeal on January 25.

Although Petitioners argued there was nothing in the record to support the reasonableness of the settlement amount, before the United States Court of Appeals for the Eighth Circuit they did not positively contest or argue that the settlement was in any way inadequate or unfair. The submissions of the parties and results in related cases more than supported its adequacy. The Eighth Circuit found due process was satisfied. (App. A4.) Petitioners had an opportunity to be heard in the settlement hearing and the Petitioners raised their objections both at the hearing and in writing. (Id.) The Eighth Circuit, based on its independent view of the record, found the district court adequately stated its reasons for approving the settlement agreement and the fee award. The Eighth Circuit also concluded that the Petitioners did not show that the agreement was unfair. (App. A4-5.)

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Record Supports the District Court's Order.

The district court and the Eighth Circuit were aware, through the record in this case, of how the relief achieved in this case fit into the total relief achieved in all the cases. The record shows the reasonableness not only of the settlement but also of the attorney fee award, which involved ten cases which were consolidated and therefore ten sets of class counsel. The record shows the considerable risk in bringing these cases and the significant hurdles that existed before the Plaintiffs could claim success. Indeed, in explaining why they seek certiorari Petitioners do not even contend that the settlement was not reasonable. Nor do they contend that the record does not support the district court's order. They only argue that the

district court should do more work by placing additional statements within the order. This case does not present an appropriate case for certiorari.

B. There Is No Conflict In the Courts or With This Court's Holding.

There is no conflict in the courts or with this Court's holding, as Petitioners allege. The role of a court in passing upon the propriety of a settlement is a delicate one. Since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the courts must not turn the settlement hearing into a trial or a rehearsal of trial. Rather, in the words of this Court, Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968), it must reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." As said in Protective Committee, 390 U.S. at 434, "[I]t is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law."

Protective Committee involved the judicial approval of compromises in a Chapter X bankruptcy proceeding where no hearing was held. The district court made no reference to any of the objections having been filed and nowhere in the record was there an explanation offered by the trustee as to its cursory recommendation of the

compromises. The record left the court unable to tell whether the trial court had really evaluated the wisdom of the proposed compromise. Thus, appellate courts have rejected approval of settlements where the trial court acted without sufficient facts concerning the claim or failed to allow objectors to develop on the record facts going to the propriety of the settlement. Neither of those situations exists here.

The district court, as the record shows, was well aware, through the record in this case, of how the relief achieved in this case fit within the total relief achieved in all the cases and that the settlement reached was a good settlement for the class. Here, as the Eighth Circuit points out, the record shows the trial court held hearings, heard the objectors out in writing and in person, and found that their arguments did not change its assessment. Clearly, the Eighth Circuit does require that the district court have shown it made a reasoned judgment about the settlement after hearing opposing views. Accordingly, there is no real conflict among the circuits on the core principle on which this Court insists and there is no reason to review the phrasing of the particular means by which the various circuits implement that principle.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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